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In the Supreme Court of the United States

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October Term, 1940.

THE SCHRIBER-SCHROTH COMPANY,
Petitioner,
vs.
THE CLEVELAND TRUST COMPANY,
CHRYSLER CORPORATION,
Respondents.
No. 9.

THE ABERDEEN MOTOR SUPPLY COMPANY,
Petitioner,
vs.
THE CLEVELAND TRUST COMPANY,
CHRYSLER CORPORATION,
Respondents.
No. 10.

THE F. E. ROWE SALES COMPANY,
Petitioner,
vs.
THE CLEVELAND TRUST COMPANY,
CHRYSLER CORPORATION,
Respondents.
No. 11.

RESPONDENTS' MEMORANDUM OPPOSING PETITIONERS' APPLICATION FOR A WRIT OF CERTIORARI TO CORRECT DIMINUTION OF THE RECORD.

A. C. Denison,
F. O. Richey,
Wm. C. McCoy,
Of Counsel for Respondents.

The Gates Legal Publishing Co., Cleveland, Ohio

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RESPONDENTS' MEMORANDUM OPPOSING PETITIONERS' APPLICATION FOR A WRIT OF CERTIORARI TO CORRECT DIMINUTION OF THE RECORD.

We oppose the application for the following reasons:

(1) The blueprint copy sought to be added to the record in this case was in the record before neither the District Court nor the Circuit Court of Appeals. It was never received in evidence in the District Court.

The copy was marked for identification, Exhibit BB at page 455 of the record. Another blueprint copy was produced at page 670 of the record and offered in evidence as Exhibit BB-1. Objection was made that the two copies were duplicates of each other and counsel for petitioners then said: "I will leave it out." Exhibit BB-1 was thus withdrawn by petitioners' counsel and was, as we have said, never received in evidence.

The testimony on Exhibit BB failing to identify it, it was never offered in evidence. Defendants' expert witness, Mr. Stellman, to whom, and to whom only, it was exhibited, testified concerning it (R. p. 455):

> "I have no personal recollection of the making of that drawing.
>
> * * * * *
>
> "I have no personal recollection of when this drawing was made."

The drawing was omitted from the Court of Appeals record because it was never included in the District Court record and not for the reasons stated by counsel for petitioners in their application. Principal counsel for respondents advised principal counsel for petitioners that this blueprint copy was omitted and would continue to be omitted from the record because it had never been received in evidence and because it was not an exhibit in the case. Principal counsel for respondents never advised principal counsel for petitioners that it would be included in the record. Principal counsel for petitioners clearly understood at the time it was omitted from the record that such was the reason for its omission and never made any further protest or request that it be included in the record, though the case has been before this Court and twice before the Court of Appeals since that time. It is, therefore, clearly incorrect to say that counsel for petitioners understood or relied upon a belief that this blueprint copy would be included in the record. It is very clear also that it was not

omitted from the record through inadvertence, accident or mistake, but was omitted because it had never been received in evidence in the trial Court and, further, that this was clearly understood by counsel for both parties at the time it was omitted.

(2) The drawing is immaterial. The witness Castor testified (R. p. 671):

> "Referring to Exhibit BB-1, that piston (was)* not put into production. I know that."

Even if the drawing was included in the record before this Court, it would stand merely as a drawing of a piston without any evidence as to the date of the drawing, when the drawing was made, if it ever was, how often the drawing was changed after it was made, when the piston shown in it was made, of what it was made, etc. The only evidence regarding the piston is that it was never put into production.

There is no doubt that counsel for petitioners did not offer it in evidence after having it marked for the reason that in the light of the evidence (or lack of evidence) concerning it to which we have referred, its immateriality to any issue in the cause was recognized.

(3) The drawing is a copy and secondary. The original was never produced. Inability to produce the original is not established so as to establish a foundation for secondary evidence. Though the evidence on the existence of the original, like all the other evidence regarding the drawing, is indefinite or uncertain, it seems just as reasonable to conclude that the original was in existence at the time the copy was produced as to conclude anything else regarding the drawing (R. p. 670).

(4) In view of the other evidence in the case it is apparent that the drawing is either misdated or else, what

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* The word "was" appears in the typewritten transcript (p. 1236); it was omitted in error from the printed record.

is more probable, was modified after the date which it bears. This evidence is discussed at pages 58 to 70 of respondents' brief.

The blueprint is dated "May 8-19." That this is not May 8, 1919 is clear not only from the uncertain markings after "19" on the drawing, showing that the "19" on the drawing means the centuries and not the years, but from the proof which shows that there was no such piston in 1919 (see pages 58-70 of respondents' brief). That the drawing was made later than 1919 is evidenced by at least two things; first, because it contains improved features not incorporated in the 1921 piston (R. p. 2271) and, second, because it shows a "die cast" piston, as the drawing says, and the Franklin Company was using sand cast pistons until the latter part of 1920 (R. p. 451).

The sentence quoted in the middle of page 2 of petitioners' application from the letter of February 25, 1935 must be read with the understanding that the blueprints marked Exhibits BB and BB-1 were not in evidence and, therefore, not "Defendant's exhibits," and that petitioners' counsel had been told that they were and would be omitted because they were not exhibits and not in evidence. Yet petitioners omitted each of these blueprints from the counter praecipe filed by petitioners (R. pp. 1273-79).

It results that this, a reviewing Court, is asked to include secondary evidence in the record that was intentionally and for good cause omitted by petitioners' counsel from the record before each the trial Court and the Court of Appeals. We doubt if this, a reviewing Court, would want to, or should, include in the record evidence which was not before either the trial Court or the Court of Appeals whose ruling this Court is about to review. We doubt if this would be proper even if the evidence were primary and material and there were an excuse for omitting it. Here not only is there no excuse for omitting the evidence in the District Court, but it was omitted intentionally to the full knowledge of counsel for both parties, first, because it was

not identified and, second, because it was secondary and immaterial.

Petitioners' Failure to Comply With This Court's Rules:

The certiorari to correct diminution of the record as shown in the petition filed by petitioners should have been filed in printed form, as shown in Rule 17 of the Rules of the Supreme Court which provides "no certiorari to correct diminution of the record will be awarded in any case, unless a printed motion therefor shall be made, and the facts on which the same is founded shall be shown * * *."

Rule 7 of the Rules of the Supreme Court states that all motions must be printed and that forty copies must be printed.

The procedure usually followed is to give opposing counsel fifteen (15) days' notice of the date selected for presenting the motion to the Court. The counsellor for the petitioner must appear in open Court and formally present the motion. No argument is permitted unless the Court especially directs it.

We have submitted herewith the affidavit of William C. McCoy affirming the facts stated in this brief.

We, therefore, think the application should be denied.

Respectfully submitted,

A. C. DENISON,
F. O. RICHEY,
WM. C. MCCOY,
Of Counsel for Respondents.

Cleveland, Ohio,
October 10, 1940.

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AFFIDAVIT OF WILLIAM C. McCOY.

STATE OF OHIO,
CUYAHOGA COUNTY, ss.

WILLIAM C. McCOY, being duly sworn, deposes and says:

That on Thursday, February 21, 1935, affiant conferred with Petitioners' counsel, John H. Sutherland, Esq., in connection with the narrative and praecipe for the Court of Appeals in the above cause; that during said conference of February 21, 1935, said Sutherland proposed that Defend-

ants' Exhibit BB be included in the praecipe and was advised by affiant at that time that Exhibit BB was not in evidence and, therefore, should not be included in the praecipe, and said Defendants' Exhibit BB therefore was not included in the praecipe sent to Petitioners' counsel on February 25, 1935.

That the subject-matter quoted from in Petitioners' brief from affiant's letter dated February 25, 1935 did not include exhibits that were not in evidence and did not refer to Defendants' Exhibit BB. That statement related only to other of Defendants' exhibits.

WILLIAM C. McCOY.

Subscribed and sworn to before me this 10th day of October, 1940.

FLORENCE KOFSKY,
Notary Public.

(Notarial Seal)

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